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No. 87-1798

IN THE

Supreme Court Of The United States

October Term, 1987

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Petitioner,

v.

MARSHALL DURBIN FOOD CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

ARGUMENT 1

I. The Constitutional Issue is Substantial 1

II. There is strong division among the circuits as to the enforcement of Federal Rule of Civil Procedure 9(b) 3

CONCLUSION 4

TABLE OF AUTHORITIES

Statutes and Rules: *Page*

ERISA, 29 U.S.C. § 1001 et seq. 4

Federal Rule of Civil Procedure 9(b) 3, 4

Cases:

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 1, 3

Bankers Life & Casualty Co. v. Crenshaw, 56 U.S.L.W. 4418 (1988) 2, 3

Giaccio v. Pennsylvania, 382 U.S. 399 (1966) 3

Jordan v. De George, 341 U.S. 223 (1951) 3

Other Authorities:

J. GHIRADI & J. KIRCHER, 1 PUNITIVE DAMAGES LAW & PRACTICE § 3.06 (Cum. Supp. 1987) 3

The Birmingham News, December 17, 1987 2

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REPLY BRIEF OF PETITIONER, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

ARGUMENT

I. The Constitutional Issue is Substantial.

This Court noted *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813, 828-29 (1986) that the issue of the constitutionality of punitive damages must be resolved "in an appropriate setting." Respondent Durbin says this is not an appropriate setting, but offers little reasoning except to allege that the argument was not raised below. Respondent is incorrect. The issue of punitive damages, the excessiveness thereof, and the impro-

priety thereof, was raised in the trial and appellate court. The argument was refined in the application for rehearing to the Court of Appeals and further refined in Equitable's petition for certiorari. As Justice O'Connor noted in her concurring opinion in *Banker's Life & Casualty Co. v. Crenshaw,* 56 U.S. L.W. 4418, 4422 (1988), petitioner is not required to repeat the same arguments which advanced in the lower courts. Respondent claims that petitioner Equitable can only repeat or rehash earlier arguments. Respondent is incorrect. The entire appellate and certiorari process allows and encourages an appellant or petitioner to refine arguments, which is exactly what Equitable has done here.

This case is the "appropriate setting" for a determination of the constitutionality of punitive damages. The punitive damages levied here are five hundred times greater than the maximum fine provided by the Alabama Criminal Code for the same conduct alleged in the complaint. The action is between two large business entities, each with sufficient staffs and resources to monitor its business dealings. Respondent Durbin is the nation's twelfth largest chicken producer, processing 1.8 million chickens a week. The Birmingham News, December 17, 1987, at page 7B. This is not the case of an insurance company mishandling a claim where an individual had his leg amputated below the knee. *See Bankers Life & Casualty Co. v. Crenshaw,* 56 U.S.L.W. 4418 (1988). The punitive damage award in this case, according to the trial court, was largely influenced by an unfortunate inflammatory comment made by a witness for Equitable who was not involved in the transaction made the basis of the suit. Transcript at 394-95. Equitable's witness Jean Rassell commented that she became involved after litigation began when she decided to see for herself if one of the letters made the basis of the lawsuit could be understood by "chicken farmers in Alabama . . . with only fifth grade educations." Transcript at 294. The jury had no standard by which to govern itself in the award of punitive damages. That lack of a standard has not been changed by the Alabama Tort Reform Act, contrary to respondent's argument

on page 8 of its brief. Respondent Durbin says that this Court should defer to the legislature, but legislative band-aids are insufficient here. The Alabama legislature's 1987 tort reform legislation does not eliminate punitive damages. Thus, although this Court has waited for legislative remedies, since the Alabama legislature's remedy is constitutionally insufficient, the Court should act here to eliminate punitive damages.

Respondent ignores that this case is an appropriate setting for the examination of the constitutionality of punitive damages by arguing the issue was not raised sufficiently below. Although this is incorrect (*see supra*), failure to raise an issue below is not fatal to a petition for certiorari. *Bankers Life & Casualty Co. v. Crenshaw,* 56 U.S.L.W. 4418, 4420 (1988). For example, in *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813 (1986), this Court addressed the constitutional argument not previously raised in the lower courts. See J. Ghiradi and J. Kircher, 1 Punitive Damages: Law and Practice, § 3.06, at 15 (Cum. Supp. 1987). While it may not have been prudent for this Court to review the constitutionality of punitive damages in the *Crenshaw* appeal where the issue was not specifically raised and no reference was made to the Constitution or Eighth Amendment in the petition for rehearing to the Mississippi Supreme Court, this case, which comes to the Court through certiorari, has specific constitutional challenges refined and raised to the 11th Circuit on rehearing.

II. There is strong division among the circuits as to the enforcement of Federal Rule of Civil Procedure 9(b).

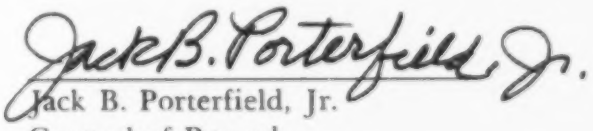
Respondent Durbin's brief discussion of Rule 9(b) ignores the differences existing between the circuits in the enforcement of Rule 9(b). Durbin ignores the constitutional standard of specificity recognized by this Court not only in the enforcement of criminal statutes, but the enforcement of civil ones as well: *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966), and *Jordan v. De George,* 341 U.S. 223 (1951). The equal protection clause of the Fourteenth Amendment requires equality in the law,

particularly when the object of the law, whether criminal or civil, is punishment.

CONCLUSION

For the reasons specified, this petition for certiorari is the appropriate setting for a determination of the constitutionality of punitive damages and for a declaration to the federal courts for uniform enforcement of Federal Rule of Civil Procedure 9(b). The prohibition of the assessment of punitive damages by ERISA, 29 U.S.C. § 1001 et seq., was sufficiently addressed in the original petition; respondent fails to identify why the broadest interpretation does not apply since Congress obviously intended to provide protection for pension and employee benefit plans and to encourage their creation. Petitioner, The Equitable Life Assurance Society of the United States requests the Court grant its Petition.

Respectfully submitted,



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